

DOCKET NO. 574709

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, PETITIONER	§	
	§	
MILLIE GRAY, KENNETH MILLER,	§	
LEE ANN MILLENDER,	§	
VICKIE RESTIVO,	§	
DONALD THOMAS, INDIVIDUALLY AND	§	
AS REPRESENTATIVE OF OPELIKA	§	
BAPTIST CHURCH,	§	
PROTESTANTS	§	ALCOHOLIC
	§	
VS.	§	
	§	
THE CHANGE OF ADDRESS/RENEWAL	§	
APPLICATION OF	§	
TRBS INC.	§	
d/b/a THE RED BULL SALOON	§	
PERMIT NO(s). N508332, PE508333	§	
RESPONDENT	§	
	§	
HENDERSON COUNTY, TEXAS	§	
(SOAH DN. 458-08-3354)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 26th day of September 2008, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on June 23, 2008 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 22, 2008. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's renewal application and request for change of address/location be **GRANTED**.

This Order will become final and enforceable on October 22, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED this the 26 day of September, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150-A
Dallas, Texas 75235
VIA FACSIMILE TO: (214) 956-8611

TRBS Inc.
d/b/a The Red Bull Saloon
RESPONDENT
10503 Hwy 31
Murchison, TX 75778
VIA FIRST CLASS MAIL

Millie Gray
PROTESTANT
10571 State Hwy 31 East
Murchison, Texas 75756
VIA FIRST CLASS MAIL

Kenneth Miller
PROTESTANT
11431 CR 3520
Murchison, Texas 75756
VIA FIRST CLASS MAIL

Lee Ann Millender
PROTESTANT
13060 CR 3520
Brownsboro, Texas 75756
VIA FIRST CLASS MAIL

Vickie Restivo
PROTESTANT
10751 CR 3518
Murchison, Texas 75756
VIA FIRST CLASS MAIL

Donald Thomas, Pastor
Opelika Baptist Church
PROTESTANT
10972 CR 3520
Brownsboro, Texas 75756
VIA FIRST CLASS MAIL

Shelia A. Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Longview Enforcement Office

SAL/aa

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 22, 2008

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA FACSIMILE 512/206-3203

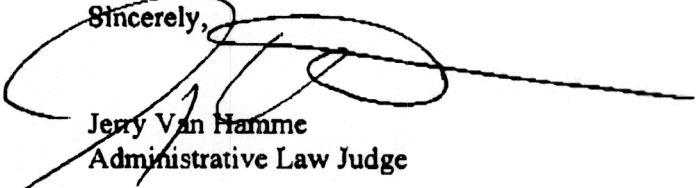
**RE: Docket No. 458-08-3354 Texas Alcoholic Beverage Commission V. TRBS INC.
D/B/A The Red Bull Saloon**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


Jerry Van Hamme
Administrative Law Judge

JVH/lan
Enclosure

xc Shelia Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**
TRBS d/b/a The Red Bull Saloon, **VIA REGULAR MAIL** 10503 Hwy 31 Murchison, Texas 75778
Donald Thomas, Opelika Baptist Church **VIA REGULAR MAIL** 10972 County Rd. 3520 Brownsboro, Texas 75756
Kenneth Miller, **VIA REGULAR MAIL** 11431 County Rd. 3520 Murchison, Texas 75756
Vickie Restivo, **VIA REGULAR MAIL** 10751 County Rd. 3518 Murchison, Texas 75756
Lee Ann Millender, **VIA REGULAR MAIL** 13060 County Rd. 3520 Brownsboro, Texas 75756
Mille Gray, **VIA REGULAR MAIL** 10571 State Hwy 31 East Murchison, Texas 75756

SOAH DOCKET NO. 458-08-3354

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
MILLIE GRAY, KENNETH MILLER,	§	
LEE ANN MILLENDER, VICKIE	§	
RESTIVO, DONALD THOMAS,	§	
INDIVIDUALLY AND AS	§	
REPRESENTATIVES OF OPELIKA	§	
BAPTIST CHURCH,	§	
Protestants	§	
	§	
V.	§	
	§	
TRBS INC. D/B/A THE RED BULL	§	
SALOON,	§	
Respondent	§	
	§	
HENDERSON COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS
(TABC CASE NO. 574709)		

PROPOSAL FOR DECISION

TRBS, Inc., Respondent, is the holder of a Private Club Registration and Beverage Cartage Permit, No. N-508332, for the Red Bull Saloon, 10270 Staway Ranch Road, Murchison, Henderson County, Texas. On November 1, 2007, the Texas Alcoholic Beverage Commission (Commission) received a renewal and change of address application from Respondent, requesting that Respondent's permit be renewed and its location changed to 10503 State Highway 31, Murchison, Henderson County, Texas.

Protestants, which include members of the Opelika Baptist Church and individuals living near Respondent's present and proposed new locations, protested the application, asserting that Respondent's permit renewal and change of address should be denied based on the general welfare,

health, peace, moral safety of the people and on the public use of decency. The
 (off) (off) had independent evidence to prove the same. The permit and
 address change. The Administrative Law Judge (ALJ) recommends that the requested permit and
 address change be granted by the

JURISDICTION, NOTICE AND PROCEDURAL HISTORY

contested, not jurisdiction, raise this problem.
 Therefore, these findings of fact and conclusions of law, without further
 here.

On 200 public hearing before Jerry Ham, ALJ, the State
 Office Administrative Hearings, Mark Road, Dallas, Staff was represented by
 the undersigned attorney. Protestant appeared. Respondent appeared. The record
 was closed that

LEGAL STANDARD AND APPLICABLE LAW

The Commission may refuse to issue renewal permit if it has reasonable grounds to believe
 that the licensee's conduct which Respondent may conduct its business warrants the refusal based
 on the general welfare, health, peace and safety of the people and the public
 utility. TEX. ALJ. CODE ANN. 46(a)(1)

III. EVIDENCE

Staff: Evidence and Conclusions

offered respondent private bus R. rating and Rev. age Cartage permit

evidence. The expiration date for Respondent's permit was January 17, 2008. Staff also presented a protest filed with the Commission. The protest included five affidavits and a 44-page, 793-signature, petition from persons opposing Respondent's renewal and change of address application. Staff's position was that Respondent has met all Commission requirements for renewing the permit and moving its location to its proposed new address.

B. Protestant's Evidence and Contentions

1. Evidence

At the hearing Protestants offered an additional 468 signatures opposing Respondent's permit renewal and address change. Protestants also offered an 11-page exhibit showing school bus routes and bus ridership in the area of Respondent's proposed new location, showing that two afternoon school buses and one special needs bus from the Brownsboro Independent School District operate in the Opelika community, and two afternoon school buses, with a ridership of approximately 102 students, pass Respondent's proposed location on SH 31. Protestants likewise presented maps and photos of the Opelika area and photos of a railroad crossing on CR 3518.

2. Kenneth Miller

Kenneth Miller, a resident of Opelika, Texas, testified that Opelika is a close-knit, quiet, religious community, consisting of family residences with small children. Children play and travel on or about the county roads in the area. It was his opinion that accidents and alcohol-related traffic violations increased on the county roads when the Red Bull Saloon was open and decreased when it was closed.¹ Mr. Miller attributed the alcohol-related citations to Respondent's presence in the

¹ A printout of total citations issued on SH 31 by the Texas Department of Public Safety from 2005 to June 18, 2008, encompassing Athens, Murchison, and Brownsboro Texas, between mileposts 666 and 680 (Protestant's Ex. No. 16), showed that from 2005 through June 18, 2008 DPS issued more alcohol-related citations per year on SH 31 in this area while the Red Bull Saloon was operating than when it was not operating.

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 4

community. Mr. Miller also testified he was personally aware of accidents and of at least one DWI arrest occurring near his home, but he did not know whether these events were directly attributable to Respondent's patrons. He also opined that the Red Bull Saloon is not the kind of business establishment that is consistent with the morals of the area.

3. Millie Gray

Millie Gray testified she is a long-time resident of the area, living on CR 3518 with her invalid husband near Respondent's existing location and across the road from Respondent's proposed new location. She testified that Respondent's existing location generated traffic that passed by her house and loud music she could hear from her home. In her opinion, allowing Respondent to move to the proposed new location across the road from her residence would make the noise and traffic near her house worse and be a burden to her infirmed husband. In addition, she believed increased traffic would pose a threat to her visiting grandchildren and local school buses.

4. Amy Gould

Amy Gould, district director for District 4 state representative Betty Brown, testified that Rep. Brown did not take a position on Respondent's address change and permit renewal, but that, upon request, had provided Protestants with a list from the Texas Department of Public Safety (DPS) of all DPS-issued citations on SH 31 from milepost 666 to 680, encompassing Athens, Murchison, and Brownsboro Texas, for 2005 through June 18, 2008. (Protestants Ex. No. 16).

5. Donald Thomas

Donald Thomas, Pastor of the Opelika Missionary Baptist Church, testified that his church is a made up of approximately 250 moral, up-standing, hard-working citizens, and that the Church

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 5

covenant provides that members of the church should abstain from the sale of, and use of, intoxicating drinks as a beverage. He also testified he has provided pastoral counseling for persons who have experienced alcohol-related problems, and that, in his opinion, having the Red Bull Saloon in the community compromises the moral standards of the community and, in particular, the morals of children in the community.

6. Howard Wilson

Howard Wilson, Chairman of the Moral Action Committee of the Baptist Missionary Association of Texas, testified that the Baptist Missionary Association represents 78,000 Baptists who oppose alcohol sales, particularly sales in an area where alcohol sales have not previously existed. Alcohol, in his opinion, negatively affects a community and results in increased drug use and alcohol-related deaths, particularly among young people.

C. Respondent's Evidence and Contentions

1. Document

Respondent offered a 112-page exhibit (Respondent Ex. No. 4) listing the names of persons in favor of Respondent's renewal request and address change.

2. Euris Hatton

Euris Hatton, the adjoining property owner to Respondent's proposed new location, testified there are only eight houses located on CR 3518 which runs adjacent to Respondent's proposed new location, that he has no concerns with the Red Bull Saloon moving next to his property, and that he rarely sees children playing or traveling on or near the county road, although his view of the roadway is obscured by trees.

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 6

3. Lea Childress

Lea Childress is a TABC certified bartender, and has tended bar at the Red Bull Saloon's present location for three years. She testified she has never received any complaints about noise from the Red Bull Saloon by any adjoining property owners in her three years of employment. She also testified Respondent has posted the "Eleven Steps to Responsible Alcohol Beverage Service" (Respondent Ex. No. 1) on the premises.

4. Robin Taylor

Robin Taylor is the daughter of Padre Simpson, an officer/director of the Red Bull Saloon (TABC Ex. No. 1, p.7). Ms. Taylor testified that the proposed new location for the Red Bull Saloon is a little over 1,000 feet from the Red Bull Saloon's current location.

IV. ANALYSIS

The evidence in the instant case shows that Respondent was initially granted a permit for the Red Bull Saloon in 2002, the permit expired on January 17, 2008, Respondent has met all Commission requirements for renewing the permit and moving its premises to a new location, and Respondent's proposed new location is a little more than 1,000 feet from its original location. The old location is on the south side of SH 31, almost directly across the highway from the proposed new location on the north side.

Protestants challenged Respondent's request arguing that it should be denied on the basis of the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(6). To deny a permit on such basis "some unusual conditions or situations must be shown so as to justify a finding that the place or manner in which the

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 7

applicant may conduct his business warrants a refusal of a permit.” Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667, 669 (Tex.Civ.App. — Corpus Christi 1976). *See also*: Texas Alcoholic Beverage Commission v. Jack E. Mikulenska d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App. — San Antonio 1974); 650 S.W.2d 208; Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208, 210 (Tex. App.—El Paso 1983).

Such unusual conditions include, for example, where the mayor, chief of police, sheriff, and property owners from three subdivisions opposed the permits on the grounds that granting the permits would create a probable increased traffic hazard, Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667 (Tex.Civ.App. — Corpus Christi 1976); where the mayor, chief of police, sheriff, members of the board of a nearby public school, and nearby property owners and church members opposed the permits on the grounds that granting the permits would increase traffic congestion and negatively change the nature of the neighborhood, Helms d/b/a The Thirsty Turtle v. Texas Alcoholic Beverage Commission, 700 S.W.2d 607 (Tex. App. — Corpus Christi 1985); and where potential traffic problems might arise from a premise’s exit being on a frontage road at the roadway’s “gore area,” Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W.2d 686 (Tex.App. — Fort Worth 1994).

The evidence in the instant case does not show that renewing Respondent’s permit or allowing it to move approximately 1,000 feet from one side of SH 31 to the other will increase traffic congestion, create a traffic hazard, or negatively impact the existing nature of the neighborhood. No evidence was presented from any law enforcement officers, elected officials, “first-responder” firefighters, emergency medical personnel, or highway design and construction engineers showing that Respondent’s current premises has created a traffic hazard or congestion on the roadways in the past, or that renewing Respondent’s permit and allowing Respondent to move to its proposed new location will create a traffic hazard or traffic congestion in the future.² Furthermore, no evidence

² No evidence was presented showing how much traffic occurs, on average, on SH 31, CR 3518, CR 3520, and CR 3508; how much traffic on these roadways is attributable to Respondent’s customers; whether

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 8

was presented from any law enforcement officers or elected officials showing that Respondent's moving from one side of SH 31 to the other will negatively affect the existing nature of the neighborhood, or constitute a new, unusual, or significant threat to the children of the community.

In addition, no evidence was presented showing that Respondent ever received any noise-related complaints at its current location or that reason exists to believe Respondent would generate an unacceptable amount of noise at its proposed new location, nor was evidence presented showing that the number of DPS citations issued on SH 31 from 2005 to June, 2008, even if attributable in part to Respondent's patrons, constituted an "unusual condition or situation." While Protestant's general disapproval of alcoholic beverage consumption is important, and their concern regarding the negative affect of alcohol on society understandable, such evidence does not rise to the level of "unusual conditions or situations" that "justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit." Dienst v. Texas Alcoholic Beverage Commission, at 669.

V. RECOMMENDATION

Accordingly, the ALJ recommends that Respondent's renewal application for a Private Club Registration and Beverage Cartage Permit for the Red Bull Saloon be renewed, and Respondent's change of address to 10503 State Highway 31, Murchison, Henderson County, Texas, be granted.

VI. FINDINGS OF FACT

TRBS, Inc., Respondent, is the holder of a Private Club Registration and Beverage Cartage Permit, No. N-508332, for the Red Bull Saloon, 10270 Staway Ranch Road, Murchison, Henderson County, Texas. The mailing address for Respondent is 10503 State Highway 31,

Respondent's original permit increased traffic congestion or created a traffic hazard on these roadways; that renewing Respondent's permit would increase traffic congestion or create a traffic hazard on these roadways; that moving Respondent's location to its proposed new location would increase traffic congestion or create a traffic hazard on these roadways; that Respondent's original permit created a traffic hazard at the railroad crossing on CR 3518; or whether renewing Respondent's permit and granting Respondent's address change would create a traffic hazard at the railroad crossing on CR 3518.

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 9

Murchison, Henderson County, Texas.

2. On November 1, 2007, the Texas Alcoholic Beverage Commission received a renewal and change of address application from Respondent requesting to move Respondent's location to 10503 State Highway 31, Murchison, Henderson County, Texas.
3. Respondent has met all Commission requirements for renewing the permit and for moving to the proposed new location.
4. A protest to the application was filed by individual residents of the neighborhoods where Respondent's establishment is presently located and the site of the proposed new location.
5. The Commission received a 66-page petition from residents requesting that Respondent's application to renew its permit and change its location be denied.
6. A Notice of Hearing dated June 11, 2008, was issued by The Commission's Staff notifying Respondent of the protest and informing the parties of the nature of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
7. An Order Setting Hearing & Establishing Requirements for Participation was issued by SOAH on June 17, 2008, informing the parties of the time and place of the hearing.
8. On June 23, 2008, a public hearing was held before Jerry Van Hamme, ALJ, at the State Office of Administrative Hearings, 6333 Forest Park Road, Dallas, Texas. Staff was represented by Shelia A. Lindsey, attorney. Respondent appeared *pro se*. Protestants appeared *pro se*. The record was closed on that date.
9. Respondent's proposed new location on the north side of SH 31 is approximately 1,000 feet from its existing location south of SH 31, and almost directly across the highway.
10. There was insufficient evidence to prove that renewing Respondent's permit and granting Respondent's change of address would cause a traffic hazard or unreasonable traffic congestion on SH 31 or any other roadway in the area.
11. There was insufficient evidence to prove that renewing Respondent's permit and granting Respondent's change of address would negatively change or affect the existing neighborhood.
12. No unusual condition or situation exists to warrant refusing Respondent's request to renew its permit and change its address.

SOAH DOCKET NO. 458-08-3354 PROPOSAL FOR DECISION

PAGE 10

VII. CONCLUSIONS OF LAW

- 1 The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.46(a)(8).
- 2 The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
- 3 Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE §155.55.
- 4 Granting Respondent's request to renew its permit will not adversely affect the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
- 5 Granting Respondent's request to change its address will not adversely affect the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
- 6 Respondent's renewal application for a Private Club Registration and Beverage Cartage Permit for the Red Bull Saloon, and its request for a change of address to 10503 State Highway 31, Murchison, Henderson County, Texas, should be granted.

SIGNED August 22, 2008.

JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS